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No. 1168

In The Supreme Court of The United States October Term, 1967

Roger F. Cote, Petitioner,

v.

The State of New Hampshire, Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of New Hampshire

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BRIEF FOR RESPONDENT IN OPPOSITION

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No 1168

ROGER F. COTE, Petitioner,

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THE STATE OF NEW HAMPSHIRE, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT
OF NEW HAMPSHIRE

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the New Hampshire Supreme Court (App. A. of Petition) is reported at 108 N.H. 290; 235 A.2d 111.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Whether the State in a criminal case may impeach the credibility of a defendant who takes the stand in his de-

fense by cross-examining him as to prior criminal convictions, subject to the control of the trial judge in his discretion.

II. Whether the trial judge abused his discretion in the present case so as to have committed reversible error.

STATUTES INVOLVED

The statutes involved are properly set forth in the Petition.

STATEMENT

During the presentation of the State's case in the Superior Court the defendant was allowed to cross-examine the State's witness, a Mrs. Lemon, as to the details of a prior misdemeanor conviction as follows:

"Q. As a matter of fact, you had a Superior Court session yourself on April 19, 1965, did you not?

A. Yes, the day the car was taken.

Q. And that was a matter of some seriousness?

A. To a certain extent.

Q. Would you mind telling us what it involved?

A. Well, assault.

Q. With what, please?

Mr. Bussiere. I object, your Honor . . .

The Court. What do you say?

Mr. Nixon. I say that on cross examination I am entitled to go into such matters in detail.

The Court. To what purpose?

Mr. Nixon. The purpose of credibility and impeachment.

The Court. You may proceed.

Q. Thank you. Assault with what, please?

A. Well, with a pair of scissors.

Q. And that was assault upon a person's body with a pair of scissors? *That is the way the charge read?"* R. 47 (See generally R. 47 to 51). [Emphasis added.]

Further cross-examining the same witness, the defense inquired as to whether there were any charges pending against the witness (R. 51), and whether the witness' husband was currently under indictment (R. 41).

Later, in cross-examining Mrs. Lemon's husband the defense sought to establish that he had an interest in the proceedings (R. 77 & 78) and cross-examined him as to a previous misdemeanor conviction (R. 78).

During the presentation of the defendant's case the State was permitted to cross-examine the defendant as to his prior convictions of one felony and several misdemeanors. This examination is reported in the Petition, (pp 4-8).

At the close of the evidence, in its final argument to the jury the State made the following remarks:

> "There have been a lot of previous offenses introduced. You cannot use them as evidence of guilt, but you can use them as evidence of credibility. What do lawyers mean by that? They mean it is likely that this person is telling the truth on this point, . . ." (R. 209).

Later in his charge to the jury, the trial judge further delineated the limits of the prior conviction cross-examination as follows:

> "The State must prove his guilt. The fact that the State was allowed to introduce evidence as to the record of the respondent that was introduced, can be used and be considered by you on the basis of credibility . . . the State must prove the elements of the crime which has been charged against the respondent by the evidence in the case. The evidence in the case is the testimony and the exhibits which you accept, and it is for you to say what you accept and what you reject, and also for you to say what weight you give to the testimony." (R. 219 and 220).

ARGUMENT

At the outset respondent feels constrained to address itself to the assertion that the petitioner in this case was unrepresented by counsel as to prior convictions used to impeach his credibility at the trial in Superior Court. Though this point is not argued in the Petition, it is briefly mentioned in the Questions Presented (Petition p. 2) and appears in the record certified by the New Hampshire Supreme Court.[1]

The record of this case shows that the New Hampshire Supreme Court opinion was given on October 31, 1967. A motion for rehearing was filed on November 7, 1967 and denied on December 5 of that same year. A supplementary motion for rehearing was filed December 14 and denied December 29, 1967. This last motion raised for the first time the allegations that petitioner was not represented

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1 See certified copy of *Supplementary Motion for Rehearing*, filed in New Hampshire Supreme Court on December 14, 1967.

by counsel when convicted of certain misdemeanors, and was not represented during District Court proceedings concerning a felony case; although the supplementary motion admits he was represented by counsel during his trial on that felony case in Superior Court.[2]

Respondent submits that the above question is not properly before this Court, since it was never properly before the New Hampshire Supreme Court.[3] *California* v. *Taylor*, 353 U.S. 553, 557, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16.

Even had this issue been properly raised before the New Hampshire Supreme Court, the rule set forth in *Burgett* v. *Texas*, 389 U.S. 109; 88 Sup. Ct. 258, which is greatly relied on by petitioner, is limited by the opinion to prior *felony* convictions at which a defendant is not represented by counsel. *Gideon* v. *Wainwright*, 372 U.S. 355 upon which the *Burgett* case is premised:

> "... established the rule that the right to counsel guaranteed by the Sixth Amendment was applicable to the states by virtue of the Fourteenth, making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one." *Burgett* v. *Texas*, supra, 88 Sup. Ct. at 261.

As we have shown, the petitioner in this case was represented by counsel at the time of the one felony conviction used to impeach his credibility.

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2 In New Hampshire the jurisdiction of district courts is limited to misdemeanors. N.H. RSA 502-A:11 (supp). Their jurisdiction in felony cases is limited to binding defendants over for indictment by the grand jury. N.H. RSA 502-A:13 (supp).

3 N.H. RSA 490 Appendix, Rules of the Supreme Court of New Hampshire, Rule No. 10, limits motion for rehearing to within ten days after the clerk notifies the parties of an order in the case.

On the other hand, *Burgett* v. *Texas,* supra, involved a situation quite dissimilar from that presented in this case. There is no indication Burgett testified in his defense, and the case was not decided on the basis of impeachment of credibility.

Certiorari is not warranted in this case because there is no conflict of decisions by the New Hampshire Supreme Court and this Court, and because the decision below was manifestly correct based upon the facts of the case.

I

THERE IS NO CONFLICT OF DECISIONS

The Petition does not seem to argue that there is a conflict of decisions in the area of prior conviction cross-examination. In fact, the cases upon which the Petition relies as compared to the New Hampshire Supreme Court's opinion in this case negate the existence of such conflict. In *Spencer* v. *Texas,* 385 U.S. 554 this Court conceded the possibility of prejudice in cross-examining a defendant as to his prior record, but expressed the belief that:

> "The defendant's interests are protected by limiting instructions and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence . . ." Id. at 561

In *Luck* v. *United States,* 348 F. 2d 763 (1965) the Court decided that under the applicable statute[4] the admission of prior criminal convictions to impeach credibility is dependent on sound judicial discretion.

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4 14 D.C. Code section 305 (1961), which reads in part as follows: "No person shall be incompetent to testify . . . by reason of his having been convicted of crime, but such fact may be given in evidence to effect his credibility as a witness . . ." Compare N.H. RSA 516:33 (App. B of Petition)

> "In exercising discretion in this respect, a number of factors might be relevant, such as the matter of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case . . ." Id. at 769; See also *Gordon* v. *United States,* 383 F.2d 936 (1967), and compare *State* v. *Cote,* supra, 235 A.2d at 116.

Such judicial procedure does not violate that fundamental fairness guaranteed by Fourteenth Amendment due process. *Spencer* v. *Texas,* supra, at 564.

II

THE DECISION BELOW IS CLEARLY CORRECT

The decision of the New Hampshire Supreme Court in the present case is clearly correct. That Court's decision merely upheld as sound the discretion exercised by the trial judge in allowing the prior conviction cross-examination of the petitioner during his trial in Superior Court.

Although other reasons might justify that exercise of discretion, the rather extensive cross-examination of the State's witnesses by petitioner's trial counsel as to prior convictions, indictments and charges found against them would, standing alone, justify the Court's decision. Upon taking the stand to testify in his defense, the petitioner placed his credibility in issue, as opposed to the credibility of the State's witnesses he sought to impeach. (See *Statement* p. 2, supra).

The trial judge occupies a preferred position for the purpose of determining how sound discretion should best steer the evidence at a trial: ". . . and, as is generally in accord with sound judicial administration, that discretion

is to be accorded a respect appropriately reflective of the inescapable remoteness of appellate review." *Luck* v. *United States,* supra, at 769.

CONCLUSION

For the above reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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